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"PATENT APPLICATION"

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before the Board of Patent Appeals and Interferences

In re Application of

JAMES D. KROL

APPEAL NO. 2008-1794

U.S. Serial No. 10/692,857

Group Art Unit 1761

Filed: October 27, 2003

L. Tran, Examiner

LOW CARBOHYDRATE FOOD PRODUCT
AND METHOD OF MAKING THE SAME

Alexandria, Virginia
July 28, 2008

BOARD OF PATENT
APPEALS & INTERFERENCES
JUL 28 2008

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

REQUEST FOR RECONSIDERATION OF THE DECISION ON APPEAL

Dear Sir:

This Request For Reconsideration Of The Decision On Appeal is being submitted in response to the Board Of Patent Appeals And Interferences's ("Board") Decision On Appeal mailed May 28, 2008 in order to set forth errors in the Board's decision. If a point raised by the Board is not specifically addressed herein, such is not to be understood as acquiescence therein, but rather that appellant is addressing the main points of error.

Appellant respectfully submits that the Board erred in (1) construing the claim language of independent claims 1, 11, 16 and 22, and (2) determining that the Examiner met his burden of making a prima facie case of obviousness based on the applied art.

I. The Board Erred In Construing The Claim Language Of Independent Claims 1, 11, 16 And 22

Appellant respectfully submits that the Board erred in its interpretation of independent claims 1 and 11. Independent product claims 1 and 11 are as follows:

1. A food product comprising:
a base layer being a formulated flour and a cheese mixture, wherein said formulated flour is a dry mixture, wherein said food product is lower in carbohydrates than a traditional pizza having a crust.
11. A crustless pizza comprising:
a base layer being a formulated flour and a cheese mixture, wherein said formulated flour is a dry mixture; and
at least one food layer, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza.

The Board interpreted the base layer of independent product claims 1 and 11 as requiring a mixture of at least two components, i.e., a formulated flour and a cheese, but also allowing the presence of additional components. (Decision p. 8). The Board also interpreted claims 1 and 11 as requiring a formulated flour in the form of a "dry mixture," but determined that the base layer, as

claimed, may include other components which may be in either dry or liquid form. (Decision p. 8). Appellant respectfully submits that the Board erred in these interpretations as set forth hereafter.

Claims 1 and 11 include in the preamble the term "comprising" which allows additional components in the final product. However, the base layer is specifically defined in the claims and is limited by the claim term "being." Specifically, claims 1 and 11 claim, inter alia, "a base layer being a formulated flour and a cheese mixture." (emphasis added). The claim term "being" is not an open term such as the claim term "comprising," but rather a closed term meaning "is," and thus, precluding any additional components in the base layer other than the dry formulated flour and cheese mixture. Thus, claims 1 and 11 limit the base layer to the two claimed components and do not allow for the presence of additional components in the base layer as interpreted by the Board. Therefore, the Board's interpretation of claims 1 and 11 is in error.

Appellant respectfully submits that the Board also erred in its interpretation of independent claims 1, 11, 16 and 22 of the claim language "formulated flour is a dry mixture." Specifically, as discussed hereafter, the Board erred in its interpretation of this claim language to allow for liquid components.

Specifically, the Board interpreted claims 1 and 11 as requiring a formulated flour in the form of a "dry mixture," but determined that the base layer, as claimed, may include other components which may be in either dry or liquid form. (Decision p. 8). As set forth above, the claim language does not allow for additional components in the base layer. Further, the claim language "dry mixture" requires that the base layer be a dry mixture of formulated flour and cheese. If the base layer included a liquid component, the formulated flour would not be dry as required by the claims. Accordingly, the base layer of claims 1 and 11 cannot include another component in liquid form as interpreted by the Board and in the references relied upon by the Examiner.

The Board further determined that while each of independent method claims 16 and 22 requires the specific step of preparing a formulated flour wherein the formulated flour is a dry mixture comprising a high gluten flour and a baking powder, the claims do not preclude additional process steps wherein other components, in liquid or dry form, are added to the formulated flour to form a base layer. (Decision p. 8). Appellant respectfully submits that the Board erred in its claim interpretation as this first step in each of claims 16 and 22 is clear that the first step requires preparing a formulated flour, wherein the

formulated flour is a dry mixture comprising a high gluten flour and a baking powder, i.e., a first layer of the food product or the crustless pizza. This step, as discussed hereafter, is not disclosed by either of or the combination of the cited references.

Independent method claims 16 and 22 are as follows:

16. A method of making a food product comprising:
preparing a formulated flour, wherein said formulated flour is a dry mixture comprising a high gluten flour and a baking powder;
distributing a pre-measured amount of said formulated flour evenly onto a cooking pan;
distributing a pre-measured amount of a cheese evenly over said formulated flour;
optionally adding and distributing evenly a pre-measured amount of at least one food layer over said cheese; and
baking said food product for a suitable time and at a suitable temperature, wherein said food product is lower in carbohydrates than a traditional pizza having a crust.

22. A method of making a crustless pizza comprising:
preparing a formulated flour, wherein said formulated flour is a dry mixture comprising a high gluten flour and a baking powder;
distributing a pre-measured amount of said formulated flour evenly onto a cooking pan;
distributing a pre-measured amount of a cheese evenly over said formulated flour;
distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over said cheese;
adding and distributing evenly a pre-measured amount of at least one food layer over said pizza sauce or said tomato sauce; and
baking said crustless pizza for a suitable time and at a suitable temperature, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza.

Claims 16 and 22 specifically teach the steps of making a food product or a crustless pizza, respectively. Each of claims 16 and 22 require the claimed steps to be in the specific order to build up the layers of the food product or crustless pizza. Accordingly, the first step in the sequence of the steps requires: preparing a formulated flour, wherein the formulated flour is a dry mixture comprising a high gluten flour and a baking powder. The next step requires: distributing a pre-measured amount of the formulated flour evenly onto a cooking pan. The next step requires: distributing a pre-measured amount of a cheese evenly over the formulated flour. Thus, these steps form the first two layers of the food product or the crustless pizza.

Claim 16 further claims in the sequence of steps: optionally adding and distributing evenly a pre-measured amount of at least one food layer over the cheese, i.e., a third layer of the food product. The last step requires baking the food product for a suitable time and at a suitable temperature.

Claim 22 further claims in the sequence of steps: distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over the cheese; adding and distributing evenly a pre-measured amount of at least one food layer over the pizza sauce or the tomato sauce, i.e.,

the third and fourth layers of the crustless pizza. The last step requires baking said crustless pizza for a suitable time and at a suitable temperature.

The reference RecipeUSA (Deep Dish Pizza recipe) (hereafter "Deep Dish Pizza recipe") discloses a deep dish pizza wherein the base layer of the deep dish pizza is made according to the following steps: beat together cream cheese and eggs until smooth; add cream, Parmesan and spices (oregano and garlic powder) and mix again; (2) oil oblong casserole dish with olive oil or spray with cooking spray; and (3) sprinkle the Italian cheeses over the bottom of the dish and pour the egg mixture over the Italian cheeses. The Google Group disclosure reference discloses "[t]here are recipes for low carb crusts that use a little flour and some whey protein in a cook book I bought..." It is only relied on for teaching flour being used in crusts. Nothing in the combination of references teaches or suggests preparing a formulated flour, wherein the formulated flour is a dry mixture comprising a high gluten flour and a baking powder; distributing a pre-measured amount of the formulated flour evenly onto a cooking pan; and distributing a pre-measured amount of a cheese evenly over the formulated flour in this order to build the layers of the food product or crustless pizza plus provide the additional method steps to further build up the layers in providing a method of making the food

product or crustless pizza.

Accordingly, this sequence of steps requires that the base layer remain dry and that additional components cannot be added to the base layer in a liquid form. Therefore, the Board erred in construing the claim language of claims 1, 11, 16 and 22.

II. The Board Erred In Determining That The Examiner Met His Burden Of Making A Prima Facie Case Of Obviousness Based On The Applied Art

The applied references, i.e., Deep Dish Pizza recipe and the Google Group disclosure, in combination, do not disclose or suggest appellant's claimed products or methods. Specifically, the Deep Dish Pizza recipe discloses a deep dish pizza made as follows: (1) beat together cream cheese and eggs until smooth; add cream, Parmesan and spices (oregano and garlic powder) and mix again; (2) oil oblong casserole dish with olive oil or spray with cooking spray; (3) sprinkle the Italian cheeses over the bottom of the dish and pour the egg mixture over; (4) bake for about 15 minutes; (5) allow to stand for 5 minutes; (6) spread on pizza sauce, sprinkle mozzarella, and pile favorite toppings; (7) sprinkle with more Parmesan (if desired); (8) return to oven and bake until bubble and browning; (9) allow to stand for 10 minutes before cutting.

Accordingly, the base layer in the Deep Dish Pizza

recipe includes Italian cheeses and a mixture of cream cheese, eggs, cream, Parmesan and spices (oregano and garlic powder). The base layer in the Deep Dish Pizza recipe is not a formulated flour and cheese mixture. The Examiner proposes using the Google Group disclosure to add flour to the Deep Dish Pizza recipe to get the invention as claimed. The Google Group disclosure only discloses flour, not a formulated flour as claimed. The combination of the base layer of the Deep Dish Pizza recipe plus the Google Group disclosure provides a product having a base layer including the combination of Italian cheeses, cream cheese, eggs, cream, Parmesan, oregano, garlic powder and flour, and not appellant's claimed base layer of the dry formulated flour and cheese.

Neither the Deep Dish Pizza recipe nor the Google Group disclosure disclose a formulated flour as claimed. The Deep Dish Pizza recipe does not disclose any flour in the recipe, while the Google Group disclosure only discloses that a little flour is used for low carb crusts. This is not a formulated flour as claimed.

Assuming the motivation to combine the Deep Dish Pizza recipe and the Google Group disclosure, the applied references do not disclose or suggest the methods claimed in claims 16 and 22. Specifically, the first step of claims 16 and 22 requires: preparing a formulated flour, wherein the

formulated flour is a dry mixture comprising a high gluten flour and a baking powder. The combination of the Deep Dish Pizza recipe and the Google Group disclosure does not disclose either a formulated flour as claimed or this step.

The next step in claims 16 and 22 requires: distributing a pre-measured amount of the formulated flour evenly onto a cooking pan. The combination of the Deep Dish Pizza recipe and the Google Group disclosure does not disclose either a formulated flour or this step.

The next step in claims 16 and 22 requires: distributing a pre-measured amount of a cheese evenly over the formulated flour. The combination of the Deep Dish Pizza recipe and the Google Group disclosure does not disclose either a formulated flour or this step.

Claim 16 further claims in the sequence of steps: optionally adding and distributing evenly a pre-measured amount of at least one food layer over the cheese; and baking the food product for a suitable time and at a suitable temperature. This order of steps is not disclosed by the references. Rather, the combination of the Deep Dish Pizza recipe and the Google Group disclosure teaches that the cheese and egg mixture of the Deep Dish Pizza recipe is baked prior to any additional components being added thereto. Thereafter, the deep dish pizza is baked a second time.

Claim 22 further claims in the sequence of steps: distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over the cheese; adding and distributing evenly a pre-measured amount of at least one food layer over the pizza sauce or the tomato sauce; and baking the crustless pizza for a suitable time and at a suitable temperature. This order of steps is not disclosed by the references. Rather, the combination of the Deep Dish Pizza recipe and the Google Group disclosure teaches that the cheese and egg mixture of the Deep Dish Pizza recipe is baked prior to any additional components being added thereto. Thereafter, the deep dish pizza is baked a second time.

As set forth above, neither reference discloses a dry formulated flour comprising a high gluten flour and a baking powder as claimed. At best, the Google Group disclosure discloses flour, but not the claimed formulated flour.

By combining the first step of the Deep Dish Pizza recipe and the Google Group disclosure, the combined first step provides beating together a combination of cream cheese, eggs, cream, Parmesan, oregano, garlic powder and flour. The baking dish is then either oiled with olive oil or sprayed with cooking spray. The Italian cheeses are then sprinkled over the olive oil or cooking spray. The mixture

of cream cheese, eggs, cream, Parmesan, oregano, garlic powder and flour is then poured over the Italian cheeses to form a base layer of cream cheese, eggs, cream, Parmesan, oregano, garlic powder, flour and Italian cheeses, not the dry formulated flour and cheese base layer as claimed.

The applied references must disclose each step of a method claim in the specific sequence as claimed in order for a claim to be obvious. The references cited by the Examiner do not disclose or suggest appellant's specific method steps as claimed.

As set forth above, it is clear that the Examiner failed to make a prima facie case of obviousness based on the applied references since the combination thereof would not provide appellant's claimed product or method.

III. Conclusion

Based on the above, appellant respectfully submits that the Board erred in (1) construing the claim language of independent claims 1, 11, 16 and 22, and (2) determining that the Examiner met his burden of making a prima facie case of obviousness based on the applied art. Accordingly, appellant respectfully requests reconsideration of the Board's Decision On Appeal and allowance of the claims in the captioned application.

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Respectfully submitted,

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